Supreme Court, U.S.
FILED
95 107 JUL 10 1995

No. _____

THE UNITED STATES SUPREME COURT
OCTOBER, 1995 TERM

DRAKE WILLIAMS
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

On Writ of Certiorari To the
United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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90 pp

QUESTIONS FOR REVIEW

1. Did the Appellate Court err when it held it did not have the power to review a ruling by a prior appellate panel, even though that prior ruling was the result of mistake or oversight?

2. Did the Appellate Court err in refusing to reverse Petitioner's convictions due to adverse publicity during Petitioner's trial?

3. Did the Appellate Court err in refusing to reverse Petitioner's convictions due to ineffective assistance of counsel at trial?

CERTIFICATE OF INTERESTED PERSONS

The undersigned Counsel of Record certifies that the following list of persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Drake Williams:	Petitioner
Robert Bennett:	Petitioner's trial counsel
Joel M. Androphy and Sandra L. Morehead:	Appellant's counsel on appeal
Kenneth Magidson:	United States' Attorney at trial
Paula C. Offenhauser and Kathlyn Snyder:	United States' Attorneys on appeal

Sandra L. Morehead

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OPINIONS BELOW

The opinions of the Fifth Circuit Court of Appeals and the District Court in this Habeas Corpus action are unreported, and are attached to this Petition as Appendix A and Appendix B, respectively. The Fifth Circuit's opinions in the direct appeal of this case are reported at 809 F.2d 1072, 817 F.2d 1136 and 828 F.2d 1.

JURISDICTION

The Fifth Circuit entered its judgment on March 9, 1995. The appellate court denied Petitioner's motion for rehearing and suggestion for rehearing en banc on April 11, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states, in relevant part "No person shall ... be deprived of life, liberty or property, without due process of law..."

The Sixth Amendment to the United States Constitution states, in relevant part "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

A. Proceedings Below

On October 26, 1984, the Grand Jury for the United States District Court for the Southern District of Texas returned a 24 count indictment against Petitioner, Drake Williams and 13 other individuals, including Drake's twin brother, Vance Williams. Williams entered a plea of "not guilty" to all counts. All defendants were tried together. On May 17, 1985, the jury returned guilty verdicts against Williams with respect to Fifteen counts, including racketeering and continuing criminal enterprise "CCE". (18 U.S.C. § 1962 and 21 U.S.C. § 848). Williams was sentenced to several concurrent and consecutive terms amounting to twenty-five years, which is the minimum for a CCE violation. Williams' brother and all of the other co-

defendants, with the exception of one, were also found guilty of multiple counts. Of the individuals convicted, only Drake Williams remains in prison.

Notice of appeal from the judgment and order of forfeiture was timely filed on August 26, 1985. On January 29, 1987, the Fifth Circuit affirmed in part and reversed in part the judgment of the trial court. ***United States v. Williams***, 809 F.2d 1072 (5th Cir. 1987). All counts as to Williams were affirmed except Counts 5 and 6 which were reversed and vacated. Even the Government agreed that there was insufficient evidence to support convictions on these counts. The convictions of all of the co-defendants were affirmed except those of Oscar Silva, which were reversed due to the trial court's failure to voir dire the jury concerning mid-trial publicity. Both Williams and his brother requested a rehearing because the Fifth Circuit did not address the mid-trial publicity issue as it related to them, even though both had adopted Silva's ground of error regarding mid-trial publicity. On May 13, 1987, in its

opinion on rehearing, the Fifth Circuit again failed to address the issue of mid-trial publicity as it regarded Drake Williams and his brother. ***United States v. Williams***, 817 F.2d 1136 (5th Cir, 1987).

On July 11, 1987, a petition for writ of certiorari was filed with the Supreme Court of the United States, No. 87-70. It was denied on October 19, 1987. ***United States v. Williams***, 108 S.Ct. 228 (1987).

On September 8, 1987, the Fifth Circuit recognized that Williams' brother Vance had in fact adopted Silva's ground of error regarding mid-trial publicity, allowed Vance to correct the record, and reversed Vance's conviction. ***United States v. Williams***, 828 F.2d 1 (5th Cir. 1987).

On September 16, 1987, Petitioner filed a motion with the Fifth Circuit to correct the record and prepare a supplemental record in accordance with the findings made in the cases of Oscar Silva and Vance Williams. The motion was denied without opinion on October 28, 1987.

On December 12, 1992, Williams filed an application for a writ of habeas corpus with the District Court in the Southern District of Texas. This Court had jurisdiction pursuant to 28 U.S.C. § 2241(a). On March 20, 1994, the Application was denied. On April 13, 1994, Williams filed his notice of appeal with the Fifth Circuit. On March 9, 1995, a Fifth Circuit panel affirmed the district court. On April 11, 1995, the Fifth Circuit denied Williams' motion for rehearing and suggestion for rehearing en banc.

B. Factual Summary

Throughout the trial, Drake Williams and his brother were grouped together as one unit by the prosecution. Because of his inherent conflict of interest, Drake Williams' counsel (who was also his brother's counsel), did nothing to counteract the prosecutor's strategy of combining Drake Williams and his brother in the minds of the jury to the point that they would find any evidence attributable to one automatically attributable to the other. The following is a summary of the occurrences at trial which tied Drake

Williams inextricably to his twin brother in the minds of the jury, none of which were objected to by the Williams' counsel:

1. Throughout his opening argument, the prosecutor referred to Drake and his brother conjunctively as "Drake and Vance" or "Vance and Drake", rarely mentioning one name without the other.

2. The prosecutor asked questions of witnesses in the conjunctive, so it was unclear when the witness answered as to whether he was referring to Drake, his brother or both. Examples include:

(a) "Did Michael mention what Vance and/or Drake-- who they were before you met them?"

(b) "Did you ever have a conversation with Vance or Drake during this time period?"

(c) "Did you ever see money exchanging hands in regard to that transaction regarding Vance and/or Drake?"

(d) "Did you ever remember seeing Vance and/or Drake Williams involved in any other currency transaction or dope transactions around this time?"

(e) "Did you ever have occasion to see Vance or Drake Williams at Michael Sahs house during this time frame?"

3. The witnesses were asked questions, both by the prosecutor and the defense attorneys, using the name "Mr. Williams". At other times witnesses would respond to questions using the name "Mr. Williams". Sometimes it was clarified as to which "Mr. Williams" was meant, but often it was not.

4. Drake Williams' counsel introduced himself to each witness as counsel for "Drake and Vance Williams", introduced his exhibits as "Williams' Exhibit" without differentiating which Williams, and at least twice became confused as to which Williams brother he was asking a questions about.

5. The Government's summary witness prepared an exhibit titled "Williams Brothers", which combined the income and expenditures of Drake and his brother in order to show that expenditures exceeded reported income.

During the trial, a witness, Julia Reinhart, testified that Williams' identical twin brother, Vance Williams, and co-defendant Oscar Silva were continuing to engage in drug deals even while the trial was going on. As a result of this testimony, the trial court ordered Silva and Vance Williams' bond revoked. The testimony and the subsequent bond revocation received extensive publicity from both of the local newspapers, the *Houston Chronicle* and the *Houston Post*.

One article, which appeared in the *Houston Post* on April 25, 1985, and was referred to in the Fifth Circuit's original opinion on direct appeal, had a front page picture of co-defendants Oscar Silva and Vance Williams (Drake William's identical twin), and a lengthy discussion of the case, which labelled Drake Williams the leader of the drug

gang: "the alleged gang, headed by certified public accountant Drake Williams of Santa Fe, N.M., has not been fazed by two indictments and a five year federal investigation". The caption under the photo was entitled, "Silva, left, and Williams leave Federal Building in chains." The first paragraph of the article read as follows:

> Federal prosecutors sprang a surprise witness Thursday on four defendants in a month-old racketeering and drug trial, presenting evidence that the alleged gang's marijuana deals have continued even during the trial.

Although the article mentions that Vance Williams and Oscar Silva were rearrested and held without bond, the article continually refers to Vance Williams only by his last name, Williams, which is, of course, Drake Williams' last name.

Another article, printed in the *Houston Post* on April 27, 1985, repeated Reinhart's allegations that Vance Williams and Silva were still engaging in drug deals and states "... Williams, whose twin brother Drake Williams is the lead defendant in the case..." The article goes on to refer to drug transactions using only the name "Williams". It is unclear as

to which Williams the article is referring. It should be noted that the jury did not hear Reinhart's testimony until the week following the publicity; therefore, the prejudice found by the Fifth Circuit was equally attributable to both Williams brothers because the jury had no way of knowing which Williams brother was being referred to at the time the articles appeared.

In its original opinion on direct appeal, the Fifth Circuit discussed the issue of mid-trial publicity, but only with regard to Appellants Oscar Silva, Vance Williams, Jan Grossman, Joseph Watson and Salvador Meraz. The Fifth Circuit found that the newspaper articles published mid-trial, were prejudicial as to Silva, which satisfied the threshold requirement for reversal. The Fifth Circuit further found that, in view of the extensive media coverage, the district court should have conducted mid-trial voir dire. In light of the district court's failure to do so, the panel reversed as to Oscar Silva. ***United States v. Williams***, 809 F.2d at 1097. The opinion did not address the publicity issue regarding

Drake Williams, even though he had adopted Silva's ground of error. The opinion stated, incorrectly, that the panel could not consider the publicity issue as to Vance because he had not adopted the ground of error.

In its first opinion on rehearing, the Fifth Circuit again addressed the publicity issue regarding Meraz, and stated that other Defendants had also filed motions for rehearing, but their arguments didn't merit discussion. ***United States v. Williams***, 817 F.2d 1136 (5th Cir. 1987).

Finally, in its third opinion, the Fifth Circuit recognized that Vance Williams had in fact adopted Silva's publicity issue, and reversed his conviction. ***United States v. Williams***, 828 F.2d 1 (5th Cir. 1987). Neither Silva nor Vance Williams, whose roles in the conspiracy were the actual drug sales, and who were selling drugs during the trial, were ever re-indicted.

For unexplained reasons, the Fifth Circuit failed to discuss the issue of mid-trial publicity with regard to Drake Williams, although he had adopted Issue Five of Oscar

Silva's brief, upon which Silva and Vance Williams' reversal rested. Further, Drake Williams also adopted all motions and objections made at trial on behalf of his co-defendants, including Silva's trial motion for mid-trial voir dire of the jury concerning the prejudicial publicity. It is Drake Williams' contention that, through mistake or oversight, the Fifth Circuit was never aware that the issue of prejudicial publicity, as it related to Drake Williams, was ever before it.

REASONS FOR GRANTING THE PETITION

1. The Appellate Court erred when it held it did not have the power to review a ruling by a prior appellate panel, even though that prior ruling was the result of mistake or oversight.

In affirming the trial court's denial of Williams' application for writ of habeas corpus, the Fifth Circuit held that it would not "revisit" issues which had already been determined by a prior panel. The Appellate Court stated that such a review would be to "overrule" a prior decision. However, because it is not clear that the prior panel ever made a decision regarding the publicity as it related to Drake

Williams, this Court's review may well be the first review Williams has gotten in the ten years since he was convicted.

As the procedural history presented above indicates, the original panel believed that the only defendants who had argued the adverse publicity issue were Silva, Grossman, Watson and Meraz. The panel reversed as to Silva, and held that the publicity was not prejudicial to the others. 809 F.2d 1072. In its first opinion on rehearing, the panel again addressed the issue of publicity, but only as it related to Meraz, whose name was mentioned only twice in the extensive publicity surrounding the bond revocation. The panel stated that others had also asked for a rehearing, but the opinion included only those issues that merited discussion. 817 F.2d at 1137. Note that among the "others" who had filed for rehearing were both Drake and Vance Williams, who were trying to correct the panel's mistaken opinion that they had not adopted Silva's ground of error.

In its final opinion on rehearing, the panel recognized that Vance Williams had in fact adopted the ground of error,

and reversed Vance's conviction. 828 F.2d 1. What this means is that when the panel stated in its first opinion on rehearing that other defendant's motions for rehearing were "without merit", it was not talking about Vance and Drake Williams' argument about the publicity, because it was under the mistaken belief that the Williams brothers had not adopted the ground of error.

Finally, the first panel denied Drake's motion to correct the record and prepare a supplemental record in accordance with the findings made regarding Silva and Vance Williams, and it did so without opinion. If the panel mistakenly believed the issue of publicity regarding Drake was never before it, and refused to "correct the record" so that the issue could come before it, then that panel never reviewed the issue at all. The evidence that this is so includes (1) the fact that it took two motions for rehearing and three opinions before the issue was addressed regarding Vance Williams, and (2) the fact that the panel addressed the publicity issue regarding Meraz extensively in two of its

opinions, even though Meraz' name was merely mentioned twice as part of the "gang", while the issue of publicity regarding Drake, who was mentioned several times, was Vance's twin and the alleged leader of the "gang", is never even mentioned in passing in any of the three opinions.

Although the record is correct, and the first panel technically had the issue of publicity regarding Drake before it, its failure to recognize and address properly raised and meritorious error through oversight or mistake was clearly erroneous and caused manifest injustice. A subsequent panel may review the decision of a prior panel under these circumstances. ***Royal Insurance Co. v. Quinn-L Capital Corp.***, 3 F.3d 877, 880 (5th Cir. 1993). In addition, when an issue is not clearly addressed by the prior panel, the second panel is not bound by the decision of the first. ***See Adams-Lunday v. Assn. of Professional Flight Attendants***, 844 F.2d 245 (5th Cir. 1988)(Court not barred from considering issues that were not resolved in earlier appeal); ***R.R. Donnelley & Sons v. F.T.C.***, 931 F.2d 430, 433 (7th

Cir. 1991)(Issues "lurking" in the record but not addressed do not bind the court in later cases.) Because the record tends to indicate that the issue of publicity as it relates to Drake Williams has never been addressed by any Court, the Fifth Circuit should have addressed it.

2. The Appellate Court erred in refusing to reverse Petitioner's convictions due to adverse publicity during Petitioner's trial.

The Fifth Circuit held that, assuming it could revisit the issue of adverse publicity, it was not persuaded to do so. The press, the prosecutor and the defense attorney combined to make Drake and his brother into a single defendant in the minds of the jury at trial. It is inconceivable that the articles could be so prejudicial to Drake's twin as to warrant reversal and yet be so harmless to Drake that it would escape any mention in the Fifth Circuit's opinions on direct appeal.

In order to determine whether or not a defendant was entitled to voir dire regarding mid-trial publicity, and whether the lack of that voir dire is prejudicial error, the Fifth Circuit has developed a two part test. First, the court

must determine whether the publicity is innately prejudicial, and second, the probability that the jury has in fact seen the material. ***United States v. Herring***, 568 F.2d 1099, 1104-1105 (5th Cir. 1978). The Fifth Circuit has already determined that there was a significant probability that the jury saw the material. ***United States v. Williams***, 809 F.2d at 1097. The only question remaining is whether that publicity was innately prejudicial to Drake Williams.

In ***United States v. Aragon***, 962 F.2d 439 (5th Cir. 1992), the court reversed the conviction of two defendants based on mid-trial publicity concerning their co-defendant. In ***Aragon***, the defendants' names were mentioned only as being tried with their co-defendant Aragon. ***Id*** at 442 n. 6. However, the court held that the jury could have assumed that the article applied to the defendants also because the article referred to statements by "gang members". In the case at bar, the harm was even more devastating because the news report said that the "gang" was still doing drug deals during trial, that the gang was "headed by . . . Drake

Williams", and that the witness testified (outside the presence of the jury) that her husband was supplying drugs to "Williams and his group." Such statements were certainly likely to have been taken by the jury as probative of Drake Williams' guilt. The reporter does not even say Drake "allegedly headed" the gang, but rather the article presumes his guilt. Statements regarding the gang continuing to do business and Drake Williams' position as leader of the gang directly reflected upon Petitioner's guilt or innocence on the drug charges. In addition, the articles were about and contained pictures of Drake Williams' identical twin, with whom he was combined as one defendant throughout the trial. In ***Aragon***, the convictions were reversed because the jury could have learned about past drug deals of an unrelated co-defendant. How much more prejudicial is publicity regarding ongoing drug deals of the gang allegedly headed by Drake Williams?

The newspapers said that Rhinehart contended, and the judge believed, that the GANG headed by Drake

Williams continued to conduct drug transactions during the trial. Drake Williams was tried and convicted as the head of that gang. As noted above, the jury convicted Williams on all the counts against him, even those counts the Government admitted during the initial appeal were not supported by the evidence. Clearly the publicity effected Drake as much as Vance and Silva, clearly the jury was prejudiced against Drake. Drake Williams' application for habeas corpus should be granted and his convictions should be reversed.

3. The Appellate Court erred in refusing to reverse Petitioner's convictions due to ineffective assistance of counsel at trial.

Robert C. Bennett, counsel for Drake and Vance Williams, became ineffective in his representation of Drake Williams after the publicity and evidence regarding Vance Williams' drug transactions came out during the trial. If permitted to testify as originally planned, Vance would have exculpated Drake from his convicted position as leader of the drug organization.

Furthermore, Mr. Bennett has attested that he found himself in the untenable position of being unable to focus the blame on the true "organizer" of drug activity: Vance Williams. He was unable to reinforce through direct or indirect testimony Vance's leadership position. His failure to do so was valuable to Vance, but disastrous to Drake. When the conflict became clear, Bennett moved for a mistrial, which was denied. He also moved for a severance, and this motion, also, was denied.

The following examples illustrate how Mr. Bennett's conflict affected his representation of Drake Williams at the trial:

1. One of the two main witnesses against Drake Williams, Tim Cassias, persisted in testifying about "Mr. Williams", making it unclear as to whether he was referring to Drake or to his twin. Mr. Bennett could not object, because by doing so he would highlight the fact that Vance was involved in most of the actual drug transactions.

2. As noted above, the prosector asked

questions in the conjunctive, "Vance and/or Drake". Again, Drake Williams' counsel could not object because, although such an objection would exculpate Drake, it would highlight Vance's participation in drug deals.

3. In attempting to discredit the testimony of Cassius, Bennett elicited testimony that if Vance was in a halfway house at the time of a drug deal, then he must have conducted the deal with Drake. This testimony helps Vance, but hurts Drake.

4. Julia Reinhart testified that Vance made a "tree" drawing of the drug organization with himself at the base as the leader. Bennett could not cross-examine Reinhart regarding the tree because, although it would tend to show that Drake was <u>not</u> the organizer of the enterprise (of which he was convicted), it would further inculpate Vance. In fact, Julia Reinhart could have been a very favorable witness for Drake. If Bennett had not been operating under a conflict, he could have elicited testimony from Reinhart that all of Reinhart's drug deals over the prior ten years had been with

Vance. She did no business with Drake, and could not implicate him in the drug transactions. If Bennett had no conflict, he could have established that Vance, not Drake, was the leader of the criminal enterprise.

5. The government's summary witness prepared a chart which included the income from tax returns and the known expenditures for Drake and his brother in order to show that the expenditures exceeded income, implying that they both were receiving drug money. Vance had not filed income tax returns for four of the years included on the chart; naturally, for those years Vance's expenditures exceeded his reported income. Although the inclusion of Vance's expenditures distorted Drake's income/expenditure calculation, Bennett could not object to the introduction of the chart because it would highlight both that Vance's expenditures dramatically exceeded his income and that Vance had not filed income tax returns for four years.

It is clear that a conflict of interest existed, and as a result of that conflict, Petitioner's counsel did not object to argument, testimony or evidence that tied Drake to his brother nor did he attempt to bring out evidence that Vance, rather than Drake was the leader of the so-called "enterprise. The evidence that Vance was the leader was especially crucial because Drake is incarcerated for a minimum of 25 years with no probation -- punishment for being the alleged leader of a continuing criminal enterprise.

The Fifth Circuit held that the issue of ineffective assistance of counsel was previously addressed on direct appeal when it denied Vance Williams' ground of error, which was adopted by Drake Williams. Vance asserted that his due process rights and his right to effective assistance of counsel were violated by the actual conflict of interest that occurred throughout the trial. Naturally enough, Vance did not bring up the harm to Drake Williams which was caused by Vance's arrest during the trial, and which brought the conflict of interest to a point where Bennett became

ineffective. The Fifth Circuit also held that, assuming it had the right to revisit the issue, the law has not been altered by ***United States v. Wheat***, 486 U.S. 153.

Although the Court is not required to review an issue on a §2255 motion which has been addressed on a previous direct appeal, the same issue must have been fully litigated and adjudicated on the merits. The Fifth Circuit's holding on direct appeal was that a valid waiver existed; therefore Drake and Vance Williams could not argue ineffective assistance of counsel. The court did not determine whether or not a conflict existed, nor did it consider the impact to Drake's representation caused by the mid-trial arrest of Vance. Therefore, the issue of ineffective assistance of counsel as it relates to Drake, especially in light of the effect of Vance's arrest has not been previously reviewed.

Even were the Court to determine that the issue had been reviewed, ***Wheat v. United States***, 486 U.S. 153, 108 S.Ct. 1692 (1988), did create a "new law" exception to the general rule that a court should not entertain a § 2255 motion

for claims raised on direct appeal. ***Davis v. United States***, 417 U.S. 333, 342 (1974). In ***Wheat***, this Court stated that it granted Certiorari based on the confusion among the circuits as to when the courts could and should override a defendant's waiver of conflict of interest. 486 U.S. at 158, 108 S.Ct. at 1696. The holding in ***Wheat***, is that it is not enough that the trial court ascertain that a valid, knowing waiver of conflict has been made. If an actual conflict exists, the court has a duty to require separate representation. This holding is new law. On direct appeal, the Fifth Circuit held "The brothers knowingly waived their right, intelligently and voluntarily. The law requires nothing more for a valid waiver. They cannot now argue for a reversal on this ground [that an actual conflict existed]". ***United States v. Williams*** , 809 F.2d at 1085. According to ***Wheat*** the law does require something more: that the trial court look beyond the waivers to determine if an actual conflict does exist.

The trial record, including the five instances noted above, as well as the affidavit of Robert C. Bennett, Drake

Williams' trial counsel leave little room for doubt that Drake Williams' counsel labored under a conflict of interest. In fact, counsel informed the district court of his dilemma when he moved for a mistrial and for a severance. "[I]n a case of joint representation of conflicting interests the evil...is in what the advocate finds himself compelled to refrain from doing." ***Holloway v. Arkansas***, 435 U.S. 475, 490, 98 S.Ct. 1173, 1182 (1978).

A defendant's sixth amendment right to effective assistance of counsel is violated when his lawyer has a conflict of interest. ***Cuyler v. Sullivan***, 446 U.S. 335, 397 (1980). A conflict exists whenever one defendant stands to gain significantly through the introduction of evidence that will be damaging to the other defendant represented by the same lawyer. ***Nealy v. Cabana***, 782 F.2d 1362, 1364 (5th Cir. 1986). A defendant need not show actual prejudice; only that an actual conflict of interest existed. ***Foxworth v. Wainwright***, 516 F.2d 1072, 1076-77 (5th Cir. 1975). The strength of the government's case against the defendant is

immaterial in considering whether or not he received ineffective assistance of counsel. ***United States v. Carrigan***, 543 F.2d 1053, 1057 (2d Cir. 1976). If the conflict becomes obvious mid-trial, as it did in the case at bar, the trial court still has a duty to either sever the defendants' trial or assign independent counsel to one defendant. ***Brooks v. Hopper***, 597 F.2d 57, 59 (5th Cir. 1979).

Because Drake's counsel was operating under a conflict of interest and because that conflict caused him to make decisions to Drake's detriment during the trial, Drake did not receive effective assistance of counsel during his trial. According to ***United States v. Wheat***, the trial court had a duty to look beyond the waiver to ensure that Drake Williams received a fair trial. This the judge refused to do. As a consequence, Drake Williams did not receive effective assistance of counsel as is guaranteed by the Sixth Amendment to the United States Constitution.

CONCLUSION

Wherefore, Petitioner Drake Williams prays that the Court grant his Petition for a Writ of Certiorari.

Respectfully Submitted,

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APPENDIX A

CHARLES R. FULBRUGE III
CLERK U.S. COURT OF APPEALS
FIFTH CIRCUIT
FILED: MARCH 9, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20306

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DRAKE WILLIAMS,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas (CA-H-92-3805; CR-H-84-2301)

Before KING, GARWOOD and BENAVIDES, Circuit Judges.
PER CURIAM:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Appellant Drake Williams appeals the district court's denial of his application for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. Williams argues that, through inadvertence, this court failed to review a meritorious and properly preserved error on Williams' direct appeal, specifically the prejudice to Williams caused by the district court's failure to voir dire the jury regarding mid-trial publicity. As the district court correctly noted, Williams does not dispute that this court was presented with his mid-trial publicity argument on a number of occasions in connection with his direct appeal. As Williams' counsel recognized at oral argument, there is nothing in the record before this panel that was not before the panel that heard his direct appeal and the associated petitions for rehearing and motions. In essence, this panel is being asked to overrule the decision of the prior panel. Assuming arguendo that we could revisit the decision of the prior panel, we are not persuaded by the arguments or by the record that this is a case in which we should.

Williams' second argument fares no better. This court previously addressed and rejected his claim that he was denied his Sixth Amendment right to effective assistance of counsel due to an alleged conflict of interest stemming from the fact that his attorney represented both Williams and his brother. Again, assuming arguendo that an intervening change in the law could entitle Williams to relitigate the alleged conflict issue, we have no arguable basis for revisiting the decision of the panel on Williams' direct appeal. The intervening Supreme Court decision that he points to, Wheat v. United States, 486 U.S. 153 (1988) does not alter the applicable law.

The judgment of the district court is AFFIRMED.

APPENDIX B

MICHAEL N. MILBY
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

FILED: MARCH 31, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DRAKE WILLIAMS	§	
	§	
VS.	§	CRIMINAL NO.
	§	84-230
	§	(CIVIL NO. 92-
	§	3805)
J. MICHAEL QUINLAN,	§	
FEDERAL BUREAU OF	§	
PRISONS	§	

MEMORANDUM AND ORDER

Pending before this court are petitioner's objections to the Magistrate Judge's Memorandum and Recommendation regarding the application for writ of habeas corpus. (Docket Entry No. 1024). This court referred the Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2255 (Docket Entry No. 1005); Respondent's Motion for Summary Judgment (Docket Entry No. 1012); and Petitioner's

Requests for an Evidentiary Hearing (Docket Entry No. 1021), to Magistrate Judge Milloy pursuant to 28 U.S.C. § 636(b)(1)(A) and (B).

On February 16, 1994, Magistrate Judge Milloy issued a Memorandum and Recommendation. Petitioner requested, and this court granted, a Motion for Extension of Time to File Written Objections. (Docket Entry No. 1026). Petitioner has filed timely objections.

The court has reviewed the Memorandum and Recommendation and made a de novo review of the Magistrate Judge's recommended disposition, Fed.R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1)(C); *McLeod, Alexander, Powel & Apffel P.C. v. Quarles*, 925 F.2d 853, 855 (5th Cir. 1991).

Petitioner's objections raise two arguments: (1) the Fifth Circuit did not properly consider petitioner's mid-trial publicity argument and, alternatively, the "raised and disposed of" doctrine is permissive; and (2) the Fifth Circuit did not properly consider petitioner's conflict of interest

argument and, alternatively, the Supreme Court in *Wheat v. United States*, 108 S. Ct. 1692 (1988), created a new rule of law regarding waiver of conflicts of interest.

1. Mid-Trial Publicity

Petitioner first argues that the Fifth Circuit erred in its opinion of January 29, 1987. Petitioner asserts that the Fifth Circuit "mistakenly believed" that petitioner had not raised the mid-trial publicity issue as a ground for reversal of this conviction. Although, the Fifth Circuit did not address petitioner's claim specifically, that court did discuss the claims regarding mid-trial publicity.

Petitioner filed a petition for rehearing with the Fifth Circuit raising the issue of mid-trial publicity. The Fifth Circuit issued an opinion that denied the petition for rehearing, without specifically discussing petitioner's ground. Petitioner then filed a motion to correct the record, seeking to reflect that he had timely raised the mid-trial publicity issue as a ground for reversal of his conviction. The Fifth

Circuit denied this motion, without a written opinion, on October 27, 1987.

Petitioner's present claim asks this court to find that the Fifth Circuit erred in denying petitioner's appeal, because the Fifth Circuit: (1) believed that petitioner had not timely or properly raised mid-trial publicity as a ground for reversal; and (2) the Fifth Circuit was mistaken in this belief. This court, however, must begin with the presumption that petitioner was fairly convicted. *United States v. Frady*, 102 S. Ct. 1584, 1592 (1982); *United States v. Pierce*, 959 F.2d 1297, 1301 (5th Cir.), *cert denied*, 113 S. Ct. 621 (1992). This court cannot properly hypothesize about what the Fifth Circuit "believed" when it denied petitioner's appellate motions based on mid-trial publicity. As the Supreme Court has stated: "Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless collateral attacks." *Frady*, 102 S. Ct. at 1593. Petitioner has not cited, and this court has not found, a case in which

a district court's speculation as to the reasons for an appellate court's ruling sustains a collateral attack on a conviction after an unsuccessful appeal.

Petitioner does not dispute that the Fifth Circuit was presented with Petitioner's mid-trial publicity argument on a number of occasions, and that the Fifth Circuit repeatedly denied petitioner's argument. This court holds that the issue was raised and disposed of by the Fifth Circuit on direct appeal, precluding this court's review by habeas corpus.

Petitioner also argues that the "raised and disposed" doctrine is permissive, allowing a district court to review an issue raised and decided on appeal. Fifth Circuit authority does not support this position. Rather, it clearly establishes that "issues raised and disposed of in a previous appeal from an original judgment of conviction *are not considered* in § 2255 motions." *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986) (emphasized added), *cert. denied*, 106 S. Ct. 1977 (1986). Even if this rule was permissive, it does not

allow a court to speculate as to the reasons or "beliefs" behind the Fifth Circuit's rulings on direct appeal.

2. Conflict of Interest

Petitioner claims that the Fifth Circuit did not address on direct appeal petitioner's contention that he was denied effective counsel because his lawyer had a conflict of interest in representing both petitioner and his brother. Petitioner contends that the Fifth Circuit did not fully litigate and adjudicate this issue on the merits. (Docket Entry No. 1028, p. 6). The Fifth Circuit's decision that petitioner waived the conflict of interest issue before trial makes this an issue "raised and disposed of" by the Fifth Circuit.

Petitioner asserts that *Wheat v. United States*, 108 S. Ct. 1692 (1988), established a new rule of law that "[i]f an actual conflict exists, the court has a duty to require separate representation." (Docket Entry No. 1028, p. 7). Petitioner cites no authority for this proposition, and the Fifth Circuit has rejected this interpretation of the *Wheat* opinion See *United States v. Plewniak*, 947 F.2d 1284, 1289 (5th Cir.

1991), *cert. denied*, 112 S. Ct. 1239 (1992). *Wheat* held that a district court's decision to accept or reject a waiver rests within the district court's sound discretion. Id.; *see, e.g., United States v. Vasquez*, 995 F.2d 40, 41-42 (5th Cir. 1993).

The Fifth Circuit held that petitioner had knowingly and voluntarily waived any conflict before trial. Petitioner cannot now raise conflicts of interest that arose during the trial as a basis for habeas relief. *See, e.g., United States v. Abner*, 825 F.2d 835, 843 (5th Cir. 1987).

Based on the *de novo* review of the Magistrate Judge's Memorandum and Recommendation, this court adopts it as the Memorandum and Order of this court. This Court GRANTS the respondent's motion for summary judgment; DENIES petitioner's motions for an evidentiary hearing; DENIES the application for the writ of habeas corpus, and DISMISSES this case.

SIGNED on March 30, 1994, at Houston, Texas.

Lee H. Rosenthal
United States
District Judge

APPENDIX C

MICHAEL N. MILBY
CLERK, US DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

FILED: FEBRUARY 16, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DRAKE WILLIAMS, Petitioner	§	
VS.	§	CRIMINAL NO. H-84-230 (CIVIL NO. H-92-3805)
J. MICHAEL QUINLAN, FEDERAL BUREAU OF PRISONS Respondent	§	

MEMORANDUM AND ORDER

Before the Court is Drake Williams' Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C § 2255 (Docket Entry #1005); Respondent's Motion for Summary Judgment and Brief (Docket Entry #1012); and, Petitioner's Requests for an Evidentiary Hearing (Docket Entry #1014 and #1021).

This matter was referred to the undersigned by Lee H. Rosenthal, United States District Judge, under 28 U.S.C. § 636(b)(1)(A) and (B). After consideration of the motions, the responses thereto, the applicable law, the record before the Court, and the argument of counsel, it is RECOMMENDED that Respondent's motion for summary judgment be GRANTED; and that Petitioner's requests for an evidentiary hearing as well as his motion under § 2255 be DENIED.

I. Background

Defendant Drake Williams ("Williams") and 13 other individuals, including his identical twin brother Vance ("Vance"), were charged in a 24-count criminal indictment that was returned in Houston, Texas, on October 26, 1984. (Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2255, Exhibit A) [hereinafter "Petition"]. That indictment charges Williams with the following criminal acts: Count One alleged participation in a RICO conspiracy in violation of 18 U.S.C. § 1962 (d); Counts Two and Three alleged

substantive RICO offenses in violation of 18 U.S.C. § 1962 (c); Count Four alleged that Williams engaged in a continuing criminal enterprise in violation of 21 U.S.C. § 848; Counts Five and Six charged a knowing concealment of material facts in currency transaction reports in violation of 18 U.S.C. § 1001 and § 2; Count Seven charged a conspiracy to violate the currency transaction reporting laws codified in Title 31 of the United States Code; Count Eight alleged a conspiracy to defraud the government by the preparation of false and fraudulent income tax returns in violation of 18 U.S.C. § 371; Count Nine alleged a conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846; Counts Ten, Eighteen, and Twenty-one contained accusations that he filed false income tax returns in violation of 26 U.S.C. § 7206(1); and Counts Sixteen, Seventeen, and Twenty charged possession of cocaine with the intent to distribute, in violation of 21

U.S.C. and 18 U.S.C. § 2.[1] The government also sought forfeiture of all interests that Williams acquired or maintained in violation of the RICO Act, under 18 U.S.C. § 1963(a); forfeiture of any property constituting, or derived from any proceeds which were obtained from racketeering activity; and the forfeiture of all profits obtained from Williams' participation in the continuing criminal enterprise, as well as any interest in property and contractual rights, of any kind, connected with the alleged enterprise.

Williams entered a plea of "not guilty" to all counts and he and the others were tried together before James DeAnda, United States District Judge. It should be noted that originally some of these same allegations had been pending before the Honorable Gabrielle K. McDonald in criminal cause number H-83-70. However, the indictments in that cause number were dismissed and new indictments were filed and assigned to Judge DeAnda. On May 17,

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[1] Williams was not named in Counts Eleven through Fifteen, Count Nineteen, and Counts Twenty-Two thorugh Twenty-four.

1985, a jury found Williams guilty on Counts One through Ten, Counts Sixteen through Eighteen, and counts Twenty and Twenty-one. He was sentenced to concurrent and consecutive terms of imprisonment amounting to twenty-five years and was fined $100,000.00. At trial, both Williams and his twin brother, Vance, were represented by Mr. Robert C. Bennett.

On June 12, 1985, Williams filed a motion for a new trial and an application for bond pending appeal. Judge DeAnda denied his motion for a new trial and the Fifth Circuit denied his application for bond pending appeal on February 3, 1985. On August 26, 1985, Williams filed a timely notice of appeal from the judgment and order of forfeiture. The Fifth Circuit reversed Williams' convictions on Counts Five and Six but affirmed his convictions on all other charges. United States v. Williams, 809 F.2d 1072 (5th Cir. 1987). Williams then filed a petition for rehearing. (Petition, Exhibit C). On May 13, 1987, the Fifth Circuit issued an opinion on rehearing and denied Williams' petition.

United States v. Williams, 817 F.2d 1136 (5th Cir. 1987). On September 16, 1987, Williams filed a motion to correct the record. (Petition, Exhibit D). That motion was denied by the Fifth Circuit on October 28, 1987. (Petition, Exhibit E). Williams then filed a petition for writ of certiorari with the United States Supreme Court on July 11, 1987, which was denied on October 19, 1987. United States v. Williams, 484 U.S. 896 (1987). Finally, on October 30, 1987, Williams filed a Motion for Reduction of Sentence. That motion was denied on November 23, 1987. He now seeks relief pursuant to 28 U.S.C. § 2255.

II. Grounds for Review

Petitioner's § 2255 motion asserts five grounds for review. Those grounds are as follows:

A. Whether the Fifth Circuit departed from the proper judicial procedure, thereby denying Petitioner due process, when it failed to address the issue of mid-trial publicity, as it applies to Petitioner;

B. Whether the Fifth Circuit departed from the accepted course of judicial proceedings, thereby denying Petitioner due process, by affirming the trial court's denial of Drake

Williams' requested severance from Jan Grossman;

C. Whether the Fifth Circuit departed from the accepted course of judicial proceedings, thereby denying Petitioner due process, by affirming the trial court's denial of Petitioner's requested severance from his twin Vance Williams;

D. Whether Petitioner's Sixth Amendment rights to effective assistance of counsel was violated by his attorney's conflict of interest;

E. Whether Petitioner's conviction for organizing, supervising or managing a criminal enterprise should be vacated in light of the attached affidavits of witnesses who were unable to testify at trial.

(Petition, pp.5-23).

The government has filed a motion for summary judgment claiming that each of Petitioner's asserted grounds for relief must fail, as a matter of law, because they have been decided already on direct appeal. The arguments of both parties on each of the asserted grounds for relief will be addressed separately.

III. Standards of Review

A. Summary Judgment

In considering a motion for summary judgment, a court must review the material factual issues and give the non-moving party the benefit of every reasonable inference with respect to the facts alleged by that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Trevino v. Celanese Corp., 701 F.2d 397, 407 (5th Cir. 1983). The burden is on the moving party to convince the court that no genuine issue of material fact exists as to the claims asserted by the non-movant. Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986). The non-moving party may not rest solely on its pleadings, however. For issues on which the non-movant will bear the burden of proof at trial, that party must produce summary judgment evidence and designate specific facts which indicate that there is a genuine issue for trial. Celotex, 477 U.S. at 322-324. "Testimony based on conjecture or speculation is insufficient to raise an issue of fact to defeat a summary judgment

motion because 'there is not issue for trial unless there is sufficient evidence favoring the non-moving party.'" Ruiz v. Whirlpool, Inc. No. 92-5719, slip op. 2425, 2428 (5th Cir. Jan. 31, 1994) (citation omitted). The entry of summary judgment is appropriate only if "there is no genuine issue as to any material fact." Fed. R. Civ. p. 56(c).

B. Section 2255 Motions

Title 28, Section 2255 of the United States Code ("§ 2255") affords a prisoner in federal custody the right to attack his sentence "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S. C. § 2255. Such a motion may be made at any time; it is generally recognized, however, that a defendant must first complete a direct appeal before lodging a collateral attack on a conviction. Fassler v. United States, 858 F.2d 1016, 1019 (5th Cir. 1988).

"Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). "Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a collateral proceeding." Vaughn, 955 F.2d at 368. Likewise, those issues that were previously decided on direct appeal need not be considered in a § 2255 motion. United States v. Kalish, 780 F.2d 506, 508, (5th Cir.), *cert. denied*, 476 U.S. 1118 (1986); United States v. Santiago, 993 F.2d 504, 506-507 (5th Cir. 1992). A § 2255 motion may be denied without a hearing when "the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief." United States v. Bartholomew, 974 F.2d 39, 41 (5th Cir. 1992). Similarly, claims for relief which are "unsupported generalizations" or "conclusory in nature and devoid of sufficient factual substantiation" may be

dismissed absent a hearing. United States v. Jones, 614 F.2d 80, 82 (5th Cir. 1980). The decision of a district court will be overturned only if an abuse of discretion is found. Bartholomew, 974 F.2d at 41.

IV. Analysis

A. Motion for Evidentiary Hearing

Petitioner has made two requests for an evidentiary hearing. At oral argument on the Respondent's motion for summary judgment, Petitioner detailed his reasons for requesting a hearing. Counsel for Williams cited a necessity to develop evidence on the issue of ineffective assistance of counsel because of the conflict of interest that arose during trial. Williams wishes to amplify his claim as to that conflict by presenting the testimony of trial counsel, Mr. Robert C. Bennett. However, the present record details sufficiently the basis for Petitioner's claim on this issue and the evidence that could be adduced would be cumulative of that already established. Moreover, as will be detailed below, the record conclusively shows that the issue of ineffective assistance of

counsel has been addressed previously by the Fifth Circuit. Petitioner is, therefore, not entitled to relief with respect to this claim and no hearing is necessary or required.

B. Summary Judgment Motion

1. Mid-trial Publicity

Here, Williams seeks relief under § 2255 claiming that the Fifth Circuit failed to address the issue of mid-trial publicity as it applied to him. Williams argues that the Fifth Circuit refused "to review properly raised error" thereby subjecting him "to a denial of due process." (Petition, p. 11). Williams maintains that the fact that the Court of Appeals did not address his publicity claim specifically in its written opinions is some evidence that it was not considered by that court. (Petition, p. 11). He therefore contends that "[t]his Court should review the issue and reverse [his] convictions." (Petition, p. 11).

In its motion for summary judgment, Respondent points out that the issue of mid-trial publicity, as it concerns Williams in particular, was before the Fifth Circuit on

numerous occasions. The government states that "[a]lthough the Fifth Circuit did not deliver an opinion addressing the mid-trial publicity issue as it relate[s] to Williams, the court addressed the issue by denying the requested relief." (Respondent's Answer to Section 2255 Motion, Motion for Summary Judgment and Brief, p. 4) [hereinafter "Respondent's Motion"]. Respondent therefore argues that it is entitled to judgment as a matter of law because Williams' publicity claims have been addressed previously by the appellate court.

The publicity at issue arose approximately mid-way through Williams' two month trial when one of the witnesses, Julia Reinhart, Testified that Oscar Silva ("Silva") and Vance Williams were actively engaged in drug deal even as the trial progressed. Based on that testimony, Judge DeAnda ordered the revocation of the pretrial bonds for Silva and Vance and they were remanded to custody for the duration of the trial. Ms. Reinhart's testimony, as well as the court's decision to

jail Silva and Vance, was highly publicized in two local newspapers---The Houston Chronicle and The Houston Post.

The record before the Court shows that Williams raised the issue of mid-trial publicity with the Fifth Circuit on three separate occasions: on direct appeal; in a petition for rehearing; and, in a motion to correct the record. Each of these instances is addressed below.

a. Direct Appeal

Although Williams did not raise the issue of mid-trial publicity, individually, he did adopt "Issue Five" of Oscar Silva's appellate brief, entitled "Whether the District Court should have at least asked the jury about prejudicial publicity during trial." (Petition, Exhibit F). The Fifth Circuit entered an opinion on the publicity issue and denied relief to all of the defendants except Silva, finding that as to him the publicity was prejudicial and that Judge DeAnda erred in not conducting a mid-trial voir dire of the jury to determine the effect of the publicity on them.[2] Williams,

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[2] Vance was ultimately successful in obtaining relief from his conviction on this same ground. Williams, 828 F.2d 1 (5th Cir. 1987). When the

809 F.2d at 1097. The Fifth Circuit did not mention Petitioner specifically in its written opinion. Williams, 809 F.2d at 1091.

b. Petition for Rehearing

Because the Court of Appeals failed to mention Williams specifically when discussing the publicity issue in its first opinion, Petitioner filed a petition for rehearing. The only issue that Williams outlined for review in that Petition was the impact that the mid-trial publicity had on his case. (Petition, Exhibit C). Williams argued the following:

Fifth Circuit addressed the publicity issue in its first opinion, it mistakenly found that Vance had not preserved this ground of error at the trial level and therefore, denied his request for relief. Vance then filed a motion to correct the record, stating that he had, in fact, adopted the motions of his co-defendant on this issue and thus, had preserved the error for appeal. On review of Vance's motion to correct the record, the Fifth Circuit recognized that Vance had adopted Silva's motion, noted that his situation was "factually indistinguishable" from that of Oscar Silva, granted his motion to correct the record, and reversed and remanded his conviction. United States v. Williams, 828 F.2d at 1 (Fifth Cir. 1987).

On page thirty-nine (39) through forty-five (45) of its opinion, this Court discussed the issue of mid-trial publicity, only with regard to Appellants Oscar Silva, Vance Williams, Jan Grossman, Joseph Watson and Salvador Meraz. This Court found, with regard to Oscar Silva, that the newspaper article was prejudicial, which satisfied the threshold requirement for reversal. This Court further found that in view of the extensive media coverage, the district court should have voir dired the jury. In light of the districts court's failure to do so, this panel reversed as to Oscar Silva. The Court did not reverse as to Vance Williams because of his purported failure to adopt the arguments of Silva's counsel pursuant to Federal Rules of Appellate Procedure, Rule 28(i). With regard to Appellants Grossman, Watson and Meraz, the Court found that the substance of the news articles could not be taken as probative of their guilt. According to this panel's opinion, they did not satisfy the initial requirement, that the publicity was harmful.

The Court failed to discuss this issue of mid-trial publicity with regard to Drake Williams, although he adopted Issue No. Five of Oscar Silva's brief, upon which reversal rested. Drake Williams' Motion to Adopt was filed with the Court on June 9, 1986, and granted by the clerk for the court on that day. Further, Drake Williams adopted all motions and objections made at trial on behalf of his co-defendants including Silva's trial motion for a voir dire of the jury concerning the prejudicial publicity at issue.

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> The sole question--unaddressed by this Court--left to be resolved is whether the publicity was harmful to Drake Williams.

(Petition, Exhibit C. pp. 1-3) (citation omitted). The Fifth Circuit was, therefore, faced squarely with Petitioner's claims that adverse publicity incurably harmed his opportunity for a fair trial.

The Fifth Circuit did not release a written opinion on Williams' petition for rehearing. The Court did note, however, in the introductory remarks to its second written opinion on this matter, that "[a] number of the defendants have sought rehearing, as has the United States; and we write briefly in response to such of these suggestions **as merit discussion.**" Williams, 817 F.2d at 1136 (emphasis added). The Court of Appeals also stated at the end of its opinion that "the **Petitions** for Rehearing are DENIED." Williams, 817 F.2d at 1139 (emphasis added). Based on the foregoing, the Court must conclude that the Fifth Circuit considered Williams' petition for rehearing and declined to enter a written opinion on his individual claim.

C. Motion to Correct the Record

After his petition for rehearing was denied, Williams filed a motion to correct the record. In that motion, Williams again sought relief based upon the publicity issue and argued as follows:

> On January 29, 1987, this Court reversed the conviction of co-defendant Oscar Silva because the trial court refused to voir dire the jury on the issue of mid-trial publicity. Appellant had raised the identical issue by adopting Silva's arguments, but the Court did not discuss the issue with regard to Appellant. On Motion for Rehearing Appellant reargued the same grounds that caused the reversal in Silva. This Court, again without explanation, failed to consider the issue of mid-trial publicity on rehearing.

(Petition, Exhibit D). The Fifth Circuit denied Williams' motion to correct the record, without opinion, on October 28,1 987. (Petition, Exhibit E). It is clear from the excerpt quoted above that the Fifth Circuit was once again directly confronted with Petitioner's claim on the publicity issue and, once again, chose to deny Petitioner any relief on that ground.

In light of the foregoing, the Court concludes that petitioner's contention that the Fifth Circuit failed to review

his publicity claim is without merit. There is no basis for a conclusion that the Fifth Circuit's silence is to be construed as evidence that the appellant court erroneously ignored Petitioner's claim. To the contrary, the presumption is that a defendant "stands fairly and finally convicted." United States v. Shaid, 937 F.2d 228, 231-232 (5th Cir. 1991). The Court of Appeals is to obligated to issue a written opinion on every matter that it considers. Local Rule 47.6 of the Fifth Circuit provides that the court may affirm a conviction or decision without written opinion. Therefore, the only logical conclusion here is that Petitioner's mid-trial publicity claims were considered on appeal and found to be without merit.

A § 2255 motion is "subject to dismissal if it raises claims that were previously decided on direct appeal." Davidson M. Pattiz, *Habeas Relief for Federal Prisoners*, 81 Geo. L.J. 1605 (1993). In fact, the Fifth Circuit has held that "issues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in § 2255 Motions." Kalish, 780 F.2d at 508; See also, Santiago, 993 F.2d at 506-507 (citing Kalish and noting that issues

decided on direct appeal are not to be considered in a § 2255 motion). The Court must, therefore, conclude that Respondent is entitled to judgment as a matter of law because Petitioner's claims as to the prejudicial effect of the mid-trial publicity on his case have been ruled upon by the appellate court on more than one occasion. Kalish, 780 F.2d at 508.

2. Severance from Jan Grossman

At trial, Petitioner moved for a severance from co-defendant Jan Grossman ("Grossman") on the ground that, if tried separately, Grossman would provide him with exculpatory testimony. (Petition, p. 11). The motion was denied by the trial court and that decision was affirmed on appeal by the Fifth Circuit. Williams, 809 F.2d at 1084.

Generally, "defendants who are indicted together are tried together. This rule is especially strong when the defendants are charged with committing the same conspiracy." United States v. Featherson, 949 R.2d 770, 773 (5th Cir. 1991). In United States v. Butler, 611 F.2d 1066, 1071 (5th Cir. 1980), the Fifth Circuit held that a defendant is not entitled to severance on a claim of

exculpatory testimony by a co-defendant unless he shows the following: "(1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the co-defendant will in fact testify if the cases are severed." Further, once a defendant has met the Butler requirements, "the district court must then 1) examine the significance of the testimony in relation to the defendant's theory of defense, 2) assess the extent of prejudice caused by the absence of the testimony, 3) pay close attention to judicial administration and economy and 4) give weight to the timeliness of the motion." United States v. DeSimone, 660 F.2d 532, 540 (5th Cir. Unit B Nov. 1981). The decision to grant or deny a motion for severance "is within the discretion of the trial court and is reversible only for abuse of that discretion." DiSimone, 600 F.2d 532, 540 (5th Cir. Unit B Nov. 1981).

Here, Williams contends that the Fifth Circuit's decision to affirm the trial court's action was based upon the conclusion that his motion for severance did not meet the Butler requirements as it was not supported by an affidavit

from Grossman stating his intention to testify and the substance of that proposed testimony. (Petition, p. 11). Williams argues that this conclusion by the Court of Appeals was erroneous. He contends that an affidavit by Grossman was, in fact, offered into evidence during a pretrial hearing on another matter before the case was filed in Judge DeAnda's court. The hearing that Williams relies upon is one that was held before Judge McDonald, in criminal cause number H-83-70, on November 21-22, 1983. Williams argues that "Judge DeAnda accepted into evidence all proceedings before Judge McDonald" and, therefore, the Grossman affidavit was offered in support of his motion to sever. (Petition, p. 11). Williams bases this argument on the transcript of a pretrial hearing before Judge DeAnda on January 31, 1985. (Petition, Exhibit Q). This excerpt, however, does not bolster Petitioner's claim.

The excerpt cited indicates that Judge DeAnda did admit into evidence the transcript of a portion of those proceedings in the other cause. However, at the time, Judge DeAnda was entertaining argument on Grossman' renewed

motion to dismiss based on an alleged grant of immunity. At the request of Grossman's attorney, Judge DeAnda accepted "the transcripts which contain that hearing which was held on the **identical issue** in Judge McDonald's court." (Petition, Exhibit Q, p. 132) (emphasis added). There is no showing that Judge DeAnda agreed to consider the entirety of the proceedings before Judge McDonald or that he entertained any portion of those proceedings for any purpose other than to review Grossman's prior argument with respect to immunity.

In an abundance of caution, the Court observes that if, by this claim, Petitioner is making the argument that the Grossman affidavit (Petition, Exhibit P) was properly offered in support of his motion to sever merely because it was introduced in another proceeding, his claim still must fail. Williams has not established that evidence which is presented in connection with another, different issue may be relied upon to satisfy the technical Butler standards. Further, a review of the transcript at issue from cause number CR-H-83-70 reveals that an affidavit by Grossman was offered into

evidence, but that offer was made by Robert S. Bennett[3], attorney for Beverly Lunday, in support of her motion for severance. (CR-H-83070), Docket Entry #392, Hearing Nov. 21-22, 1983, Vol 2, p. 114). The record also reveals that although offered, Grossman's affidavit was never admitted. (CR-H-83-70, Docket Entry #392, Hearing Nov. 21-22, 1983 Lunday Exhibit 3).

More importantly, when Drake Williams' motion for severance from Grossman was argued before Judge DeAnda, his lawyer, Robert C. Bennett, and made the following statement:

> My motion for Severance is based on the fact that Mr. Grossman has testimony to give exculpatory to Mr. Drake Williams that is supported by **an affidavit of counsel** in the motion, or attached to the motion and that Mr. Grossman, if his immunity is denied and if his case is pending or if he is tried with Mr. Williams, he would not be available as a witness, whereas if a severance were granted and Mr. Grossman was tried first he would then be a witness available to Mr. Drake Williams during the trial of his matter.

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[3] It should be clarified that Robert S. Bennett, attorney for Beverly Lunday, and Robert S. Bennett, attorney for Williams, are two different individuals.

(Respondent's Motion, Annex B)(emphasis added). There is no reference to Mr. Grossman's affidavit. In fact, when responding to Mr. Bennett's argument, the government pointed out that Williams had failed to comply with the requirements of Butler and made specific reference to the fact that Williams' motion was supported only by "the affidavit of his attorney as opposed to Mr. Grossman." (Response, Annex B). Mr. Bennett did not object to that characterization, nor did he attempt to inform the Court of the existence of an affidavit from Grossman by reference to any other attachment or proceeding. Based on the foregoing, the Court cannot conclude that the Court of Appeals was incorrect when it determined that Petitioner's motion was supported by his attorney's affidavit only.

Williams argues, in the alternative, that "[i]f this Court determines that the affidavit was not part of the record for purposes of the severance, the Petitioner would ask that the Court consider the failure to provide the affidavit as another example of the ineffectiveness of Petitioner's counsel." (Reply to the United States' Answer to Drake

Williams' Petition for Writ of Habeas Corpus, p. 4) [hereinafter "Reply"]. This argument is presented for the first time in Petitioner's reply to the government's motion for summary judgment.

In Strickland v. Washington, 466 U.S. 668, 687 (1984), the Supreme Court held that a defendant bringing a claim for ineffective assistance of counsel is required to show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." To show that an attorney's performance was deficient, a defendant must show that his lawyer's "representation fell blow an objective standard of reasonableness." Strickland, 466 U.S. at 687. To satisfy the prejudice requirement, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "It is not enough for [a] defendant to show that the errors had some conceivable effect on the outcome of the proceedings." Strickland, 466 U.S. at 693. A court's review of an attorney's performance "must be highly deferential."

Strickland, 466, U.S. at 689. There is a strong presumption that a lawyer's conduct is consistent with the standards that are considered to be reasonable professional assistance. United States v. Smith, 915 F.2d 959, 963 (5th Cir. 1990).

Here, Petitioner has made no attempt to satisfy the requirements of Strickland. Williams must show that the outcome of the proceedings would have been different if his attorney had attached the Grossman affidavit to the motion for severance. Petitioner has failed to allege any facts in support of such a conclusion. Even had the Grossman affidavit been attached to Petitioner's motion, it was within the trial court's discretion to deny the severance. DeSimone, 660 F.2d at 539; Featherson, 949 F.2d at 773. Absent some showing sufficient to raise a genuine issue of fact as to whether the Strickland standard has been met, this Court cannot find that Petitioner is entitled to relief on this newly asserted ground. Moreover, because the Fifth Circuit has already considered Petitioner's motion to sever, this Court will not review it again here. Kalish, 780 F.2d at 508. The

Respondent is, therefore, entitled to judgment as a matter of law on this issue.

3. Severance from Vance Williams

Petitioner contends that the Fifth Circuit "did not properly assess" the prejudice that resulted because of the trial court's failure to sever his case from that of his brother, Vance. (Petition, p. 14). While Petitioner recognizes that this issue has been addressed already by the Court of Appeals, he argues that this Court should grant him relief under § 2255 because, in affirming the trial court, the Fifth Circuit misapplied the Eighth Circuit holding in United States v. Lemm, 680 F.2d 1193 (8th Cir. 1982). (Petition, pp. 12-13).

As noted above, issues decided on direct appeal are not to be considered when reviewing a request for relief pursuant to § 2255. Kalish, 780 F.2d at 508. The issue of severance from Vance was expressly considered, in some detail, by the Court of Appeals. Williams, 809 F.2d at 1084-1085. Whether the Fifth Circuit properly applied the holding in Lemm is not left to this Court to Determine. The

analysis conducted by the Court of Appeals is the law of this case. "A decision of a legal issue or issues by an Appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court." White v. Murtha, 377 F.2d 428, 431 (5th Cir. 1967). Accordingly, the Respondent is entitled to judgment as a matter of law on this claim.

4. Conflict of Interest

Prior to their trial, Judge DeAnda gave both Williams and Vance extensive cautionary instructions concerning their joint representation by Robert C. Bennett. These instructions included admonishments that "conflicts may develop at any stage in the proceeding" and that an attorney may be "limited" in the presentation of his case and may have to "compromise to not hurt either client." (Respondent's Motion, Annex H). In view of Petitioner's expressed desire to consent to the joint representation, Judge DeAnda informed Williams and Vance specifically that

> there might be such a situation [sic] arise where it would be advantageous to a defendant

to testify in the case. But if that defendant did testify, while it might be advantageous to that defendant, his testimony might be injurious, damaging to another defendant represented by the same lawyer. And so here again, the lawyer would be caught in a quandary, well, what do I do? If I put defendant on the stand, it will help defendant A but it will hurt defendant B who I also represent. So he would be having to chose [sic] in effect as to which of his clients he might injure in a case by doing that.

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In argument, for example, even though the evidence--a lawyer might have to argue that while some defendants are guilty, obviously this other is not. In other words, the proof against one of a lawyer's clients might be overwhelming to where to lawyer just would find it with great difficulty to argue to a jury that a person was not guilty. And this would--and when he did this, he would destroy credibility with a jury and damage another defendant against whom the evidence might be very weak or equivocable and may be just barely enough to sustain a conviction. And so a lawyer would be limited in the way he could present his case in an effort to compromise to not hurt either client.

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But conflicts may develop at any stage in the proceeding and you can't just, in the middle of trial, say hey, judge, I want another lawyer because this has happened. It is too late then.

(Respondent's Motion, Annex H). After receiving the admonishment from Judge DeAnda, both Williams and Vance confirmed their intention to waive their right to conflict free representation. (Respondent's Motion, Annex H).

Here, Petitioner claims that he was denied the right to effective assistance of counsel due to an actual conflict of interest that arose during trial. (Petition, p. 14). Williams maintains that his attorney became ineffective "after the publicity and evidence regarding Vance Williams' drug transactions came out during the trial." (Petition, p. 15). While Williams recognizes that this issue has also been addressed previously by the Court of Appeals, he argues that "this decision appears to be contrary to the subsequent and recent mandate of the Supreme Court" in Wheat v. United States, 486 U.S. 153 (1988). (Petition, p. 18). Petitioner is apparently attempting to establish that his claim falls within the "new law" exception to the general rule that claims considered on appeal are not subject to a postconviction review. See, Davis v. United States, 417 U.S. 333, 342 (1974) (recognizing an intervening change in case law as an

exception to the rule prohibiting postconviction review of claims previously considered on appeal).

Petitioner contends that Wheat deems certain conflicts "unvaivable." (Petition, p. 18). The Fifth Circuit, however, has declined to read Wheat in that way. In United States v. Plewniak, 947 F.2d 1284, 1298 (5th Cir. 1991), the Fifth Circuit stated that "Wheat cannot be construed as defining certain conflicts on interest as unwaivable; rather, it stands for the proposition that the decision to accept or reject a waiver rests within the sound discretion of the trial court."

Petitioner further argues that more recent case law from this circuit suggests that a trial court has a "continuing duty" to evaluate a waiver of the right to conflict-free counsel and that Williams' pre-trial waiver was not sufficient because it was accepted prior to the events from which the actual conflict arose. (Petition, p. 20-21). Again, Petitioner is apparently attempting to bring his conflict claim within the "new law" exception. Davis, 417 U.S. at 342. This argument is, likewise, without merit. The Notes of the Advisory Committee to the 1979 Amendment to Rule 44(c)

of the Federal Rules of Criminal Procedure indicate that, in certain circumstances, it may become necessary to inquire further into the validity of a waiver. Accordingly, Williams' argument does not establish that this "continuing duty" stems from any new law that the Court of Appeals was ignorant of when presented with his claim on direct appeal. In addition, there is Fifth Circuit authority to support a finding that waivers can be deemed sufficient despite conflicts that arise late or during trial. United States v. White, 706 F.2d 506, 509 (Fifth Cir. 1983); United States v. Casiano, 929 F.2d 1046, 1053 (5th Cir. 1991).

Finally, in his reply to Respondent's motion for summary judgment, Petitioner makes another, different argument in support of his contention that this Court should re-evaluate his claim. He argues that "[t]he Fifth Circuit addressed the issue of counsel's conflict of interest only in the context of the severance issue", not in the context of Mr. Bennett's effectiveness. (Reply, pp. 4-5). This argument must also fail. The Fifth Circuit was clearly asked to evaluate the conflict of interest in light of an ineffective

assistance of counsel argument that was raised by Vance Williams in his appellate brief. The record shows that Petitioner adopted "Ground of Error Number Three" from Vance's appellate brief. (Petition, Exhibit F).

In "Ground of Error Number Three", Vance claimed that "a conflict of interest resulted from the joint representation of Appellant and Drake Williams which violated Appellant's Fifth Amendment right to due process and his Sixth Amendment right to effective assistance of counsel." (Respondent's Motion, Annex G, p. 16). Vance argued that "the totality of the circumstances and the entire record clearly reveal that the joint representation of Appellant and Drake Williams created an actual conflict of interest which prevented counsel from effectively representing Appellant and which rendered the trial of Appellant fundamentally unfair." (Respondent's Motion, Annex G. p. 21). In fact, Vance argued that an "actual conflict existed with respect to the cross-examination of witnesses" and that "the witnesses and even defense counsel treated Appellant and Drake Williams as one by confusing their identities or by

unclearly referring to one or the other as Mr. Williams." (Respondent's Motion, Annex G, p. 20-21). Vance also set out several specific examples from the trial transcript to support his claim. (Respondent's Motion, Annex G, p. 20-21)[.] Those examples are the same ones that Petitioner now presents as the basis for relief in his § 2255 motion.

The Fifth Circuit, in a section of its opinion entitled "Joint Representation of Drake and Vance Williams", held that

> The brothers knowingly waived their right, intelligently and voluntarily. The law requires nothing more for a valid waiver. They cannot now argue for a reversal on this ground.

Williams, 809 F.2d at 1085. It is, therefore, clear that the Fifth Circuit has already addressed this claim of ineffective assistance of counsel. It is also clear that the Court of Appeals was asked to consider Mr. Bennett's alleged ineffectiveness in the context of an actual conflict that arose at trial. Further, Petitioner has not shown any subsequent change in the law concerning waivers of conflict free representation that would entitle him to relief. Accordingly,

judgment should be entered in favor of Respondent on this ground as a matter of law.

5. Conviction for Continuing Criminal Enterprise

In his last ground for relief, Williams contends that his conviction for supervising or managing a continuing criminal enterprise should be vacated. He argues that Beverly Lunday was acquitted of all charges against her and, therefore, cannot be considered as one of the five or more individuals that he allegedly supervised.[4] (Petition, p. 22). He also argues that Judge DeAnda effectively prevented the testimony from several of his co-defendants that he did not occupy a supervisory position over them because he failed to grant his "Motion for Severance form Vance Williams and Jan Grossman, and Joe Watson's Motion for Severance, in which [he] and Michael Sahs joined." (Petition, pp. 22-23).

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[4] The Court notes that while Petitioner is correct that the conduct of a person who has been acquitted of an offense may not be considered to establish a continuing criminal enterprise, Williams' conviction is supported by the activities of six individuals other than Ms. Lunday.

Williams contends that had those individuals been able to testify in his behalf, the government would have failed in its attempt to prove the necessary predicate for a conviction for "supervising or managing" a continuing criminal enterprise (that is, that he supervised five or more individuals). (Petition, p. 22).

Petitioner's claim that he should have been granted a severance from Grossman has already been addressed by the Fifth Circuit. As to Vance, Joe Watson, and Michael Sahs, the Court notes that at trial Petitioner did not seek severance from those co-defendants on the ground that they would provide him with exculpatory testimony. (Respondent's Motion, Annex C). Although he adopted the severance motions made at trial by his co-defendants, none of those motions sought severance on that ground. (Respondent's Motion, Annex I; Petition, Exhibit 22). Further, Petitioner never raised this claim on appeal.

In considering Williams' argument, it is important to point out that there is a presumption that a defendant "stands fairly and finally convicted" and that a § 2255 motion "may

not so service for an appeal." Shaid, 937 F.2d at 231-232 (citation omitted). In fact, a movant under § 2255 may "not raise an issue for the first time on collateral review without showing both

'cause' for his procedural default, and 'actual prejudice' resulting from the error." Shaid, 937 F.2d at 232 (citation omitted). "A defendant must meet this cause and actual prejudice test even when he alleges a fundamental constitutional error." Shaid, 937 F.2d at 232. "Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a collateral proceeding." Vaughn, 955 F.2d at 367. Claims that are not constitutional or jurisdictional in nature may not be raised in a § 2255 motion unless the defendant can show "that the error could not have been raised on direct appeal, and if condoned, would result in a complete miscarriage of justice." Shaid, 937 F.2d at 232 n.7. Therefore, as the government correctly argues, Petitioner must show cause for this procedural default. (Respondent's Motion, p. 18).

Petitioner has failed to allege any facts that are sufficient to meet the cause and prejudice test. In response to Respondent's motion for summary judgment, Petitioner asserts only that "the general motions for severance were enough to preserve error on this issue." (Reply, p.5). This bare assertion is not sufficient to overcome his procedural default. Petitioner could not have preserved error on this issue by merely adopting the motions for severance of his co-defendants as they fail to meet the Butler requirements. Butler, 611 F.2d at 1071. Further, in order to satisfy the cause and actual prejudice test, Williams must show some recognized justification for his failure to raise this issue previously. His assertion that "error was preserved" does not excuse a failure to raise this claim at trial or on appeal.

Petitioner argues, in the alternative, that "even if error was not preserved, [his] inability to obtain the exculpatory testimony of his co-defendants" resulted in a complete miscarriage of justice. By this argument, Petitioner is apparently attempting to satisfy the different procedural default standard that is reserved for claims that fall below

constitutional or jurisdictional significance. Shaid, 937 F.2d at 232 n.7. However, Petitioner can not show that a miscarriage of justice resulted here as "affidavits are not considered 'newly discovered evidence,'" and he, therefore, would not have been entitled to a new trial on this ground even had the issue been raised on appeal. United States v. Alvarado, 898 F.2d 987, 994 (5th Cir. 1990).

Finally, Williams asks the Court to view his lawyer's failure to move for severance based upon potential exculpatory testimony as an example of his ineffective assistance. (Reply, p. 6). Again, Petitioner makes this argument for the first time in his reply and it is not supported with evidence consistent with the Strickland requirements. Williams has not alleged any facts to support the conclusion that his attorney's failure to move for severance on the basis of speculative exculpatory testimony was deficient. Nor has there been a showing that the outcome of the proceedings would have been different had such motion been made. The decision to grant or deny a motion to sever is with in the

sound discretion of the trial court. Featherson, 949 F.2d at 773.

For the foregoing reasons, the Court concludes that Respondent is entitled to judgment on this issue, as a matter of law.

V. Conclusion

In light of the foregoing, it is

RECOMMENDED that Respondent's motion for summary judgment be GRANTED and that Petitioner's motion pursuant to 28 U.S.C. § 2255 be DENIED; it is further

RECOMMENDED that Petitioner's requests for an evidentiary hearing be DENIED.

The Clerk of the Court shall send copies of this Memorandum and Recommendation to the respective parties who will then have ten (10) days from the receipt of it to file written objections thereto, pursuant to 28 U.S.C. § 636(b)(1)(C), General Order 80-5, S.D. Texas. Failure to file written objections within the time period provided shall

bar an aggrieved party from attacking the factual findings on appeal.

The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208; copies of any such objections shall be delivered to the chambers of Judge Lee H. Rosenthal, Room 8631, and to the chambers of the undersigned, Room 7007.

SIGNED at Houston, Texas this _____ day of February, 1994.

_____
Mary Milloy
United States Magistrate Judge

APPENDIX D

CHARLES R. FULBRUGE III
CLERK U.S. COURT OF APPEALS
FIFTH CIRCUIT

FILED: APRIL 11, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20306

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DRAKE WILLIAMS,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas (CA-H-92-3805; CR-H-84-2301)

ON SUGGESTION FOR REHEARING EN BANC

(Opinion _____, 5 Cir., _____, _____F.3d _____ __)

(April 11, 1995)

Before KING, GARWOOD and BENAVIDES, Circuit Judges.

PER CURIAM:

(x) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Bank is DENIED.

ENTERED FOR THE COURT:

_____

CAROLYN DINEEN KING
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE